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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO VAZQUEZ SARMIENTA,

Defendant and Appellant.

C068514

(Super. Ct. No. 10F06676)

A jury found defendant Gerardo Vazquez Sarmienta guilty of two counts of lewd and lascivious acts with a child under age 14 and found that he engaged in substantial sexual conduct in the commission of one count. The jury deadlocked and a mistrial was declared on a count of attempted lewd act.

Defendant was sentenced to state prison for the upper term of eight years on the count involving substantial sexual conduct plus two years consecutive on the other count, awarded 208 days' custody credit and 31 days' conduct credit, directed to make restitution to the victim and the Victim's Compensation and Government Claims Board in amounts to be determined, and ordered

to pay a \$2,000 restitution fine, a \$2,000 restitution fine suspended unless parole is revoked, an \$80 court security fee, a \$60 court facilities assessment, a \$287.78 main jail booking fee, and a \$59.23 main jail classification fee.¹

FACTS²

Victim F. S. was 11 years old when she testified at trial. She is one of six children born to defendant and his wife.

In December 2008, the family rented an apartment (the first apartment) in a Sacramento apartment complex. In February 2010, the family moved to another apartment (the second apartment) in the same complex.

F. S. testified that defendant touched her sexually when the family was living in the first apartment. She was lying on her bed, lulling her baby brother to sleep, when defendant entered the room, pushed her away from her brother, and pulled down her pants and underwear. Defendant pulled down his own pants, held his testicles, and rubbed his penis against the outside of her vagina. He stopped when the oldest child, A. S., entered the room.

¹ The relevant 2010 amendment to Penal Code section 2933 does not entitle defendant to additional conduct credit because he was committed for a serious felony. (Pen. Code, § 1192.7, subd. (c)(6); former Pen. Code, § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

² Our statement of facts is limited to the counts on which defendant was convicted.

A. S. confirmed F. S.'s account, recalling an incident at the first apartment in which she opened the bedroom door and saw F. S. in bed on her back while defendant stood over her. Although A. S. could not see exactly what defendant was doing, she believed he was doing something "inappropriate" because F. S. had her legs spread open and was not wearing any clothes from the waist down. A. S. got angry and told her mother that she thought defendant was having sex with her sister. A. S. then telephoned her uncle (defendant's brother) and told him what she had seen. She did not call the police because she did not want defendant to be arrested.

Defendant's brother testified that he recalled A. S. telephoning him to say that defendant had molested F. S. However, he could not recall the precise date of the call, other than it had occurred two years prior to trial. When the brother confronted defendant, he said the allegation was not true and the incident had not happened.

F. S. described an incident that occurred while the family resided in the second apartment. While she was in her bedroom doing homework, defendant walked in and beckoned her toward him. He had his pants zipper down and his penis was exposed. Defendant stood in front of F. S., lifted her shirt and bra, and fondled and licked her breast. She tried to ignore what he was doing and to focus on her homework.

A. S. corroborated F. S.'s account. She recalled an incident in which she went outside the second apartment and approached F. S.'s bedroom window. Looking through the window,

A. S. saw defendant standing in front of F. S. and pulling up her shirt. Then she saw him place one hand on F. S.'s breasts while he held his erect penis in his other hand.

A. S. became upset. She ran back inside the apartment and grabbed a telephone to call the police. F. S. asked her not to call the police. A recording of the call was played for the jury. On the tape, A. S. was heard to say "My dad is raping my sister." At trial, A. S. explained that she had used the word "rape" because she had not been familiar with the term "[c]hild molesting."

Over defense objection, the prosecution presented expert opinion testimony on Child Sexual Abuse Accommodation Syndrome. Before the expert testified, the trial court preinstructed the jury on the proper use of the opinion evidence. The expert described five commonly held but erroneous beliefs about child abuse: (1) children usually are molested by strangers; (2) child abuse does not occur between members of the same family; (3) if one sibling is molested, then all siblings are molested; (4) if child abuse occurs, the mother will know about it; and (5) after child abuse occurs, the child will report it quickly.

The expert testified that Child Sexual Abuse Accommodation Syndrome has five components: secrecy, helplessness, entrapment, accommodation, and retraction. Disclosures of child abuse often are delayed and often occur in piecemeal fashion with each successive disclosure containing greater, and

sometimes inconsistent, detail. This causes the disclosures to be perceived, incorrectly, as unpersuasive.

Defendant told a deputy sheriff that, at the time of the incident at the second apartment, he had an urgent need to use a restroom and began opening his pants before he arrived. As he passed his daughters' bedroom with partially opened pants, he noticed the room was messy and told his younger daughter to clean the mess. As he did so he heard his older daughter, who was outside the apartment, yelling at him. At that point, he looked down and realized that his penis was exposed.

In a letter dated several days after his arrest, defendant apologized to his wife for his "errors" and asked for "forgiveness." He wrote, in words translated from Spanish, "All I want to ask you for is to take back the charges against me so that they will punish me less."

The defense rested without presenting evidence or testimony.

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant. Having undertaken an examination of the entire record, we find no

arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.